

72420-7

72420-7

NO. 72420-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

C&K REMODEL, INC.
and WESCO INSURANCE COMPANY

Appellants,

v.

KIMBERLY GALE,

Respondent.

RESPONDENT'S BRIEF ON APPEAL

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I. INTRODUCTION

In the present matter, Appellant C&K Remodel, Inc. (“C&K”), seeks sanction from this Court of Appeals for its significant lack of diligence in responding to, and participating in, litigation commenced via Summons and Complaint properly filed and served on C&K for substantial damages caused to Respondent/Plaintiff Kimberly Gale (“Gale”).

Notwithstanding the fact that C&K raises most of its arguments for the first time in this appeal, C&K cannot avoid the consequences of its lack of diligence, particularly given the following basic facts:

- 1) An Answer to Gale’s Complaint was due to be filed and served not later than 20 days following October 21, 2013;
- 2) On June 24, 2014, eight months after the date on which C&K was required under Civil Rule 8 to file its Answer, Gale filed a Motion for Default because C&K had not filed an Answer;
- 3) From the commencement of the action until entry of Amended Default Judgment on July 31, 2014, C&K had been represented by at least four (4) attorneys licensed to practice law in Washington State;

4) Despite having representation, C&K's attempted, eleventh-hour *pro se* Answer did not comply with CR 11(a) [corporations must be represented by a licensed attorney].

C&K now invites the Court of Appeals to sanction its dilatory conduct, arguing that the Trial Court should have granted C&K even more time *sua sponte* (beyond the already existing 8 months of delay), even where, as here, C&K never made such a plea below.

On these facts alone, this Court should affirm the Trial Court's Entry of Amended Default Judgment and Denial of Motion to Vacate.

II. STATEMENT OF THE CASE

Respondent/Plaintiff Kimberly Gale ("Gale") is an individual and owner of certain real property located in Seattle, Washington. *CP* 1 ¶ 1.1; *CP* 38 ¶ 2. Appellant/Defendant, C&K Remodel, Inc. ("C&K") is a Washington corporation. *CP* 224 at 8:16-18. Christopher Greer is C&K's sole shareholder and officer. *CP* 224 at 8:19-20. C&K's primary office location is located at 9266 31st Avenue SW, Seattle, WA 98126, which location is also Mr. Greer's primary residence. *CP* 225 at 11:8-18.

Mr. Greer resides at C&K's primary business address together with his wife, Kelly Greer, as well as his daughter, Katie Greer. *CP* 234 at 46:2-47:10; *CP* 225 at 11:19-21. Notably, C&K's only other employee is

Mr. Greer's daughter, Katie Greer, who serves as Mr. Greer's secretary. CP 225 at 10:9-10.

This dispute began in June 2013 following a discontinuation of remodel and repair work on Gale's pursuant to a contract between Gale and C&K. CP 39 ¶ 5. Shortly thereafter, Gale discovered numerous defects in C&K's work, and she also discovered several misrepresentations by C&K relating to its legal status as a licensed and registered contractor. CP 215-216 ¶¶ 6-7; *see also* CP 38-42. As a result, Gale commenced this lawsuit in order to recover damages caused by C&K's breach of contract, Consumer Protection Act violations, and defective and illegal work on her property. *Id.*

A. Procedural History

Gale first engaged C&K in the present dispute when, on September 25, 2013, Gale's attorney, Brent Nourse, sent a letter to C&K's attorney, Jeffrey Rupert, demanding C&K remove a Materialman's Lien C&K had placed on Gale's home under RCW 60.04, *et seq.* CP 266-67; CP 324-330. After C&K released the frivolous lien (CP 264-65), Gale filed a Summons and Complaint for damages on October 13, 2013. CP 282-296. On October 21, 2013, Gale's attorney forwarded a courtesy copy of the Summons and Complaint, together with a letter, to C&K's attorney Rupert, requesting Rupert accept service on C&K's behalf. CP 330-343.

Unfortunately, on October 28, 2014, following several inquiries from Gale's attorney, C&K attorney Rupert advised that he had could not get in contact with C&K and could not, therefore accept service. *CP* 325. As a result, Gale served C&K with the Summons and Complaint via personal service on C&K's registered agent, Thomas R. Smith, on November 2, 2013. *CP* 298.

On November 11, 2013, C&K appeared in this matter through attorney Stuart Sinsheimer of the law firm Sinsheimer Meltzer. *CP* 18-19. Through discussions between attorney's for C&K and Gale, Gale initially agreed to allow C&K additional time to answer the Complaint such that C&K could tender the defense of this matter to its insurer. *CP* 218 ¶ 6. Some time in December 2013, C&K tendered Gale's Complaint to C&K's insurer. *CP* 235 at 51:10-52:25; *CP* 313-320. On January 2, 2014, C&K's insurer, through the law firm of Bullivant Houser Bailey, denied coverage and defense via letter sent to C&K via certified mail to C&K's primary office location and Mr. Greer's personal residence, 9266 31st Avenue SW, Seattle, WA 98126. *CP* 313-320. The insurer also sent a copy of the letter to C&K's new attorney, Stuart Sinsheimer. *Id.*

On January 14, 2014, Sinsheimer contacted Gale's attorney and explained that the defense had been denied. *CP* 218 at ¶ 7. Sinsheimer further explained that he was attempting to get in touch with C&K in order

to proceed with the litigation in consideration of the denial of defense from the insurer. *Id.* On February 3, 2014, following several follow-up telephone calls between Sinsheimer and Gale's attorney, Sinsheimer instructed Gale's attorney that Sinsheimer had not heard from C&K despite several attempts, and Sinsheimer intended to withdraw if he could not get C&K to call him back. *CP* 218 at ¶ 8. On February 5, 2014, Sinsheimer filed a Notice of Intent to Withdraw, which was effective February 28, 2014. *CP* 303-305; *CP* 25-26.

Between February 28, 2014 and July 3, 2014, no attorney appeared on behalf of C&K in this lawsuit. *CP* 218 ¶ 9. Despite the fact that C&K's Answer was already late by several months, Gale waited additional time before finally filing her Motion for Default on June 24, 2014, in order to allow C&K a reasonable opportunity to engage new counsel following Sinsheimer's withdrawal. *Id.* Gale's Motion for Default was supported by: (1) a lengthy and detailed declaration of Kimberly Gale; (2) a Declaration of Brent L. Nourse in Support of Motion for Default; and (3) expert testimony regarding damages, breach and causation, via Declaration of Joachim Damstrom. *CP* 30-101. Gale's Motion and supporting Declarations were served on C&K via legal messenger at C&K's registered primary business offices and Mr. Greer's personal residence at 9266 31st AVE SW, Seattle, WA. *CP* 36-37.

On June 30, 2014, Mr. Greer, acting *pro se* on C&K's behalf, apparently filed a document with the King County Superior Court entitled, "Answer and Affirmative Defenses of Defendant Surety." *CP* 438-441. Greer then telephoned Gale's attorney requesting his office address, and stating he was "having something delivered there." *CP* 218 at ¶ 11; *CP* 239 at 65:6-13. On July 1, 2014, not having received any document, Gale's attorney telephoned Greer and asked whether C&K was sending anything to his office as promised on June 30, 2014. *CP* 219 at ¶ 12; *CP* 239 at 65:14-66:13. During that same discussion, Gale's attorney asked if C&K had retained an attorney, and Greer answered that C&K **did have an attorney**, but refused to identify the name or contact information for C&K's counsel. *Id.* Greer also explained that C&K's secretary was "sending something to you." *Id.* Although Greer refused to identify to Gale's attorney who the attorney representing C&K was on July 1, 2014, Greer later testified on July 30, 2014, that Defendant had retained Jeffrey Rupert to represent Defendant. *CP* 239 at 66:1-13. Indeed, Greer testified that he had spoken with Mr. Rupert during the period between June 24, 2014 and July 1, 2014. *CP* 239 at 67:8-22; *CP* 226 at 13:2-6.

On July 2, 2014, at approximately 12:30 p.m., Gale's attorney finally received the document entitled "Answer and Affirmative Defenses of Defendant Surety," but which purported to be an Answer by C&K. *CP*

110 ¶ 2; CP 102 ¶ 12. Gale immediately moved for an Order Shortening Time pursuant to KCLR 7(b)(10) and moved for an Order Striking the “Answer and Affirmative Defenses of Defendant Surety.” CP 107-109. Gale’s attorney left voicemails for both Greer as well as the attorney of record for Defendant WESCO. CP 103; CP 219 at ¶ 13. The two motions were served upon C&K via legal messenger at 9266 31st AVE SW, Seattle, WA, because despite Mr. Greer’s assertion that C&K had retained an attorney at least as of July 1, 2014, neither Greer nor C&K had provided Gale or her attorney with the identity of C&K’s new counsel. CP 36-37.

After having filed the Motions to Shorten Time and Strike, Mr. Greer returned Gale’s attorney’s call, and the two discussed the Motion to Strike and Motion to Shorten Time. CP 219 ¶ 14; CP 240 at 70:3-23. Although Mr. Greer recollects this telephone discussion, he denies recollecting the specific discussion. *Id.* Nevertheless, during the July 2, 2014 discussion, Gale’s attorney explained to Mr. Greer that Gale was moving to strike the “Answer and Affirmative Defenses of Defendant Surety,” on the grounds that Mr. Greer could not represent the company and only an attorney licensed in Washington could do so. CP 219 ¶ 14.

On July 3, 2014, Nourse received via facsimile a Notice of Appearance on behalf of C&K from Jeffrey Rupert. CP 219-20 ¶ 15; CP

321-22. Shortly after receiving Rupert's Notice of Appearance, Rupert telephoned Gale's attorney to discuss the status of the Default Hearing and Gale's motion to strike which were both noted for that day, July 3, 2014. *CP* 219-20 ¶ 15. During that discussion, Gale's attorney explained the status and bases for both the Motion for Default as well as the pending motions to shorten time and to strike, as well as the bases for all of the above. *Id.* Rupert acknowledged the same and explained he would follow up with the Court regarding the above motions. *Id.*

Notably, Rupert neither filed the Notice of Appearance (until July 15, 2014) nor filed any Answer on C&K's behalf despite having been told by Gale's attorney that a motion to strike was pending **because it was not signed by a licensed attorney**. *CP* 220 ¶ 16.

The court granted Plaintiff's motions on July 3, 2014. *CP* 131-139. Thereafter, C&K did not file an Answer signed by its attorney (Rupert), and C&K did not file any motion for reconsideration of either the Trial Court's Orders Shortening Time or Striking Greer's *pro se* "Answer and Affirmative Defenses of Defendant Surety" pursuant to CR 59.

On July 21, 2014, through new counsel David Wiles, C&K filed its Motion to Vacate Default Judgment. *CP* 160-192. The Honorable Monica Benton heard oral argument on C&K's Motion to Vacate Default Judgment on August 26, 2014. *Verbatim Report of Proceedings*. In its

moving papers, including C&K's Reply in Support of Motion to Vacate Default Judgment, C&K argued the Trial Court should vacate or set aside the Default Judgment because: (1) C&K had a "meritorious defense;" and (2) C&K's failure to timely file an Answer to Gale's Complaint was the result of excusable neglect and/or mistake. CP 160-188. Notably, C&K **did not** argue or put in before the Trial Court any arguments regarding: (1) Gale's damages, or segregation thereof; (2) award of attorneys' fees; or (3) alleged irregularities in proceedings relating to C&K's current position that the Trial Court should have granted *sua sponte* C&K **additional time** to have an attorney sign C&K's Answer and Affirmative Defenses of Defendant Surety. *Id.*

The Trial Court denied C&K's motion to vacate the default judgment on August 26, 2014. CP 401-402.

B. No Prima Facie Defense

In its Motion to Vacate, C&K alleged via Mr. Greer's declaration that Gale engaged C&K after Gale fired a previous contractor – "Evergreen." CP 258 ¶¶ 2-3. C&K further asserted that Gale simply asserted a lawsuit against C&K "because she simply did not what to pay for the work..." and that "C&K performed all work according to accepted industry standards." CP 259 ¶¶ 5-6. Mr. Greer, however, did not provide

any facts qualifying himself as an expert, nor did he identify with which “industry standards” C&K had allegedly complied. *Id.* ¶ 6

In response, Gale submitted her own declaration establishing that while she had previously engaged another contractor named “Evergreen” to perform work on her home, that work was performed and completed without incident **four to five years prior to C&K’s arrival** at her home. *CP* 214-215 ¶¶ 3-4. Instead, Gale hired C&K after experiencing flooding in her home caused by a surged of water pressure in water pipes from the City of Seattle caused those same pipes to fail. *Id.*

Also, Gale did not pursue claims against C&K to “avoid paying.” *Id.* ¶ 7. Instead, Gale engaged experts to investigate, opine, and ultimately repair substantial damage caused by C&K’s defective, and in many instances, illegal work on her home. *CP* 215-216 ¶ 7; *CP* 64-66. With regard to these latter facts, during the July 30, 2014 *CR* 30(b)(6) deposition of C&K, Mr. Greer acknowledges that C&K was not licensed as a general contractor or as either an electrician or plumber, and C&K failed to secure proper permits or inspections for, electrical and plumbing work on the home. *CP* 229-231; *CP* 268-277. Indeed, City of Seattle inspectors officially noted that C&K caused “dangerous” conditions in Gale’s home. *CP* 227.

C&K also admitted its contractor registration and license were suspended pursuant to RCW 18.27, *et seq.* at the time it began working on Gale's home, and continued to be suspended until March 25, 2013. *CP* 232 at 37:1-7.

Greer's declaration only stated that he "properly performed work." *CP* 259 ¶ 6. On the other hand, Gale offered actual concrete facts, including expert testimony, establishing C&K's failure to perform and damages caused. *CP* 38-66; *CP* 214-216.

C. C&K's Principal, Christopher Greer, was Present in Seattle Area at all Relevant Times

Contrary to C&K's representations to the Trial Court as well as this Court of Appeals, C&K principal, Christopher Greer was substantially present in the Seattle area during the majority of the present case. *CP* 236 at 55:20-56:25; *CP* 237 at 58:5-60:25; *CP* 238 at 61:1-36:14. Mr. Greer was not in Canada full time from November 2013 through July 3, 2014. *Id.* Rather, Greer testified that his "long term obligations" in Canada concluded sometime in January 2014. *CP* 237 at 59:1-60:25; *CP* 238 at 61:7-20. Indeed, Greer explained at deposition that he, on behalf of C&K, continued to perform work for other C&K clients during the time from January 2014 through July 3, 2014. *Id.*

Importantly, while C&K's Opening Brief explains that it was "ambiguous" whether Greer was even in Seattle from June 24, 2014 through June 30, 2014 (the day Greer first telephoned Gale's attorney), Greer testified on July 30, 2014 as follows:

Q: Did you go to Canada between June 24 and June 30th?

A: No. Of this year? No.

Q: Of this year?

A: Nope.

Q: But your Paragraph 9 says, "Upon my return from Canada I was informed by my bonding company lawyer"? [sic]

A: Yes.

Q: You were in the Seattle area sleeping at your house [at 9266 31st AVE SW, Seattle, WA] from June 24th to June 30th?

A: Yes....

CP 238 at 63:4-13.

Moreover, C&K failed to provide the Trial Court, and fails here to provide the Court of Appeals, any explanation why he could not have telephoned C&K's various attorneys of record, or caused C&K's secretary to call the various attorneys of record, to ensure the licensed Washington

attorneys timely or properly complied with the Rules of Civil Procedure and filed an Answer, signed by a licensed attorney, prior to July 3, 2014.

D. C&K Has Been Represented by Numerous Attorneys of Record in this Matter

During the course of this dispute up until the August 26, 2014 hearing on C&K's Motion to Vacate Default Judgment, C&K has been represented by at least 4 (four) attorneys licensed to practice law in Washington. *CP* 226 at 16:8-24; *CP* 227 at 19:3-8; *CP* 300-301. Even before Gale commenced this matter on October 13, 2014, C&K was represented by Jeffery Rupert and a Mr. Robison. *CP* 227 at 19:3-8; *CP* 328-329. Then, from November 11, 2013 until February 28, 2014, Stuart Sinsheimer represented C&K in this lawsuit.

Most importantly, however, and despite Mr. Sinsheimer's withdrawal in February 2014, C&K affirmatively represented to Gale's attorney on July 1, 2014 that C&K was represented by an attorney **prior to the July 3, 2014 hearing on Gale's Motion for Default.** *CP* 239 at 66:1-3. Greer testified on July 30, 2014 that the attorney referenced (but not identified) to Gale's attorney was Jeffrey Rupert. *Id.* Additionally, Greer testified that he was in contact with Mr. Rupert from June 24, 2014 through July 3, 2014. *CP* 226 at 13:4-6.

C&K also does not dispute that Rupert appeared on C&K's behalf on July 3, 2014, and was explicitly notified by Gale's attorney that Gale had moved to strike Greer's *pro se* Answer and Affirmative Defenses of Defendant Surety because it had not been signed by a licensed attorney. Rupert acknowledged the same and stated he would contact the Court following his July 3, 2014 telephone conversation with Gale's attorney. *Id.* Rupert, however, neither contacted the court, filed the Notice of Appearance (until July 15, 2014), nor simply affixed his signature to the previously filed *pro se* filing. Indeed, to date, no attorney has cured the defect and filed an Answer on C&K's behalf, signed by an attorney.

III. ARGUMENT

A. Summary of Argument

Appellant C&K Remodel, Inc. ("C&K") was originally served with a complaint in this dispute in October 2013. It failed to file any Answer, despite its having been represented by two different attorneys, until Plaintiff-Respondent Kimberly Gale ("Gale") was forced to file a Motion for Default in June 2014 – nine months later. On the day before the hearing for Gale's Motion for Default, C&K finally served an Answer purporting to be a *pro se* filing of its principal, Chris Greer. The Answer lacked any signature of a Washington attorney, in violation of CR 11. When the deficiency was immediately brought to C&K's attention by

Gale's counsel, Mr. Greer asserted that C&K was, in fact, represented by counsel but refused to provide the name of such attorney.

Gale objected to the improper Answer via a Motion to Strike filed immediately after receiving C&K's improper Answer, which motion was granted on July 3, 2013, together with Gale's request for default judgment.

C&K then filed a Motion to Vacate Default Judgment in which it argued that the default judgment should be vacated under CR 60(b)(1) because, it asserted, it could satisfy the 4-part test of *Little v. King*, which requires (1) substantial evidence of a defense, (2) that the failure to appear and defend was caused by mistake, inadvertence, surprise or excusable neglect, (3) the moving party was diligent after notice of entry of the default judgment, and (4) that no substantial hardship to the plaintiff would result. In the alternate, C&K claimed that the default judgment should be vacated under CR 60(b)(11)'s remedy for "extraordinary circumstances."

C&K now additionally faults the lower court for (i) striking its improper Answer, claiming it should have been granted additional time to procure an attorney's signature, and (ii) its award of damages and attorneys' fees to Gale. However, it raised no such argument below. Its failure should not be rewarded on appeal. Each party to litigation should be required to undertake all necessary measures in the trial court to avoid

the commission or consequences of an error in order to forestall costly appeals and retrials. C&K failed to do so, and now blames the trial court for its own shortcomings.

B. The Trial Court Properly Struck C&K's Answer.

There was no abuse of discretion, nor misapplication of CR 11(a), in the trial court's striking C&K's long overdue Answer, which was fatally defective for want of an attorney's signature. Washington courts require a corporation to appear through an attorney licensed to practice law in this state. *Lloyd Enters., Inc. v. Longview Plumbing & Heating Co., Inc.*, 91 Wn.App. 697, 701, 958 P.2d 1035 (1998); *Marina Condo. Homeowner's Ass'n v. Stratford at the Marina, LLC*, 161 Wn.App. 249, 263, 254 P.3d 827 (2011); *Dutch Village Mall v. Pelletti*, 162 Wn.App. 531, 536, 256 P.3d 1251 (2011). As observed recently by Division I of the Court of Appeals, "[a]n individual who chooses to incorporate and thereby enjoy the benefits of the corporate form must also bear the attendant burdens. One such burden is the requirement that a corporation be represented in court proceedings by a licensed attorney." *Cottringer v. Wash. Dept. of Employment Security*, 167 Wn.App. 782,785, 257 P.3d 667 (2011).

Civil Rule 11 provides in relevant part:

- (a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the

attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. [...] If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

C. C&K Did Not Challenge the Striking of the Answer in the Trial Court.

C&K's complaint on appeal that the lower court refused to grant it additional time to answer properly, where it had dallied for 9 months following the filing of the Complaint by Gale, should be rejected. In particular, the trial court's actions were appropriate because C&K did not assert any argument, or cite any authority, to challenge the striking of its defective Answer below. Appellate courts do not entertain issues not raised in the trial court. "An issue, theory or argument not presented at trial will not be considered on appeal." *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978); *see also* RAP 2.5(a).

While C&K's Opening Brief claims that it should have been entitled to additional time to file an answer once the signature deficiency

was pointed out to it, and it cites on appeal authorities in which parties were permitted additional time to amend a pleading before a default was given effect, its failure to assert any argument or authority below prevented the trial court from having a proper opportunity to correct any potential error.

C&K did not move the lower court for reconsideration of the July 3, 2014 Order Striking its improper answer. As significantly, C&K has not appealed that Order in this present appeal. Indeed, while C&K assigns error to the striking of C&K's Answer, the Order of the lower court Striking the Answer is not before Division I in this matter. While C&K's first assignment of error attempts to pigeonhole the Rule 11 order into the Default Judgment Order, in fact, the two were separate Orders of the Superior Court, and C&K has appealed only the latter. Had C&K's Notice of Appeal, filed September 2, 2014, included the Order Striking its Answer as a basis of the appeal, the notice of appeal would have been untimely with respect to such contention under RAP 5.2 in any event. RAP 2.2, RAP 5.2. Thus, even if this Court determines that the Motion to Vacate the Amended Judgment should have been granted, C&K would be left with the Order striking its Answer being a verity on appeal.

C&K's assignment of error to the trial court's refusal to set aside the default and vacate the Default Judgment is harmless to the extent that

C&K, having failed either to move the trial court to reconsider Rule 11 authorities or to appeal the Order Striking the Answer, cannot now cure the deficiency. A litigant may not remain silent regarding a claimed error and later raise the issue on appeal. *Lamon v. McDonnell Douglas Corp.*, 91 Wash.2d 345, 352, 588 P.2d 1346 (1979); *Grange Ins. Ass'n v. Ochoa*, 39 Wn.App. 90, 92, 691 P.2d 248 (1984). The Order Striking the Answer is a verity.

D. The Rule 11 Cases Cited by C&K are Distinguishable.

C&K admits that Mr. Greer's signing of the answer was deficient and that striking the answer was appropriate because it failed to satisfy the requirements of CR 11 without bearing a signature of an attorney. Opening Brief at 18; *Lloyd v. Longview Plumbing & Heating Co.*, 91 Wn. App. 697, 701, 958 P.2d 1035 (1998), *rev. denied*, 137 Wn.2d 1020 (1999). However, C&K now contends that it should have been given a further opportunity to cure its deficient answer pursuant to *Biomed Comm.Inc. v. Dep't of Health*, 146 Wn.App. 929, 935, 139 P.3d 1093 (2008), *Finn Hill Masonry, Inc. v. Dep't of Labor & Indus.*, 128 Wn.App. 543 545, 116 P.3d 1033 (2005), *rev. denied*, 156 Wn.2d 1032 (2006); *Griffith v. City of Bellevue*, 130 Wn.2d 189, 194 922 P.2d 83 (1996), and *Dutch Village Mall v. Pelletti*, 162 Wn.App. 531, 256 P.3d 1251 (2011), *rev. denied*, 173 Wn.2d 1016 (2012). While it is true that, in the cases

cited by C&K, the courts ordered that the respective parties be given additional time to cure the lack of an attorney's signature on the pleadings at issue, each of the cases is distinguishable from the matter at bar.

First and foremost, unlike the present case, each and every pleading in the cases cited by C&K were otherwise **timely**. Here, C&K's *pro se* Answer was 8 months late. C&K cannot cite to any case, and Gale cannot find any, where the courts have ruled **additional time** was required to allow a corporation to secure a proper signature from a licensed attorney when the complained of pleading was 8 months late. This is particularly true the corporation, here C&K, had legal counsel during the pendency of the action **and at the time the hearing on Motion for Default was pending**.

Moreover, Mr. Greer was put on actual notice prior to the hearing date that Gale intended to strike his improper answer. C&K glosses over this fact on appeal, but it is irrefutable. Mr. Greer further represented on July 1 -- prior to the hearing -- to Gale's counsel that he *was* in fact represented by counsel, although Greer would not provide the name of his attorney. Counsel for Mr. Greer then sent Gale's counsel a notice of appearance on July 3 (although such notice was not filed with the court until July 15.) Ultimately, C&K had the opportunity prior to entry of the default to cure the deficiency, but it and its counsel failed to do so.

Moreover, C&K's lack of diligence is distinguishable from the other authorities it cites because, as opposed to the parties in the cases it relies upon, it failed even to answer Gale's Complaint for 9 months following the Complaint's filing, notwithstanding that it had been represented by two different attorneys prior to the filing of the Motion for Default. The Answer itself was untimely and C&K had more than ample opportunity to answer when it was represented, including after receiving notice of the deficiency but before the default hearing in which its Answer was stricken. Greer was in Seattle the entire time between service of the Motion for Default and the July 3 hearing. Counsel was retained (per C&K's representations to Gale) and made aware of the impending deadline but failed to act diligently. To wit, counsel failed even to contact the trial court after having been retained on July 3.

Further, while the Answer was filed *pro se* on June 30, it was not properly served on Gale until July 2, 2014. Immediately upon receiving the Answer, Gale's counsel left a voicemail for C&K stating Gale's intent to move to strike the answer and file a motion to shorten time for hearing the same. The fault for Gale's moving to shorten time on one day's notice rests with C&K, for filing its Answer on the eve of the default hearing not with Gale for moving to strike the Answer on shortened time.

E. The Trial Court Properly Granted Default Judgment Against C&K following the Striking of its Answer.

With a pending Motion for Default before it, the trial court properly granted default judgment to Gale once C&K's Answer was struck from the record. CR 55. Although defaults are generally disfavored, at times, justice requires a default. *Morin v. Burris*, 161 P.3d 956, 160 Wn.2d 745 (Wn. 2007). When served with a summons and complaint, a party must appear. *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007). There must be some potential cost to encourage parties to acknowledge the court's jurisdiction. *Id.*

The lower court's remedy here of granting a default judgment was warranted because C&K and its multiple attorneys of record failed even to answer the complaint until the last moment before the default hearing, whereupon C&K, acting on an attorney's advice, improperly filed an answer *pro se*, which was properly stricken by the lower court.

F. There Was No Abuse of Discretion in Denying the Motion to Vacate Default Judgment.

A decision to grant or deny a motion to vacate a default judgment is within the trial court's discretion. *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007). The decision will not be disturbed on appeal unless the trial court abused its discretion. *White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968). A trial court abuses its discretion when it acts on

untenable grounds or for untenable reasons. *Little v. King*, 160 Wn.2d at 703. A proceeding to vacate or set aside a default judgment is equitable in its character, and the relief sought or afforded is to be administered in accordance with equitable principles and terms. *Roth v. Nash*, 19 Wn.2d 731, 144 P.2d 271 (1943).

C&K failed to act with reasonable diligence throughout this litigation in the lower court. Equity aids the vigilant, not those who slumber on their rights. *Harman v. Dept. of Labor & Indus.*, 111 Wn. App. 920, 927, 47 P.3d 169 (2002)(quoting *Leschner v. Dept. of Labor & Indus.*, 27 Wn.2d 911, 928, 185 P.2d 113 (1947)). C&K slept on its rights to appear and defend against the claims and now wishes to be rewarded on appeal for its oversight. The appellate court should not reward its inaction.

G. C&K Cannot satisfy the CR 60(b)(1) Factors to Overturn the Default Judgment on Appeal.

Although default judgments are generally disfavored, courts value and prioritize an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules. *Little v. King*, 160 Wn.2d 696, 703—04, 161P.3d 345 (2007). C&K failed to meet its burden in overturning the

default judgment in the lower court and cannot sustain the even greater burden to disturb it on appeal.

For C&K to prevail on appeal under CR 60(b)(1), it must first establish that (i) it has a meritorious defense to Gale's claims, and (ii) its neglect or mistake in failing to respond properly is excusable under the circumstances of the case. *Commercial Courier Serv., Inc. v. Miller*, 13 Wn.App. 98, 553 P.2d 852 (1975). More recent Washington jurisprudence on default judgments impose as additional "secondary" requirements that a defaulted defendant further show (iii) the Defendant acted with due diligence after notice of the default judgment, and (iv) the plaintiff will not suffer a substantial hardship if the default judgment is vacated. *Ha v. Signal Elec. Inc.*, 182 Wn.App. 436, 446, 332 P.3d 991 (2014) (citing *Little v. King*, 160 Wn.2d 696, 703-04, 161 P.3d 345 (2007)).

1. The Trial Court Properly Ruled That C&K Has No Meritorious Prima Facie Defense.

Appellate courts apply an abuse of discretion standard in reviewing a trial court's determination that prima facie showing of a meritorious defense is lacking. *Ha v. Signal Elec. Inc.*, 182 Wn.App. 436, 446, 332 P.3d 991 (2014) (citing *Little v. King*, 160 Wn.2d 696, 703-04, 161 P.3d 345 (2007)).

A prima facie showing of a defense to the substantive claim is required to establish that a subsequent trial would be merited. *Farmers Ins. Co. of Washington v. Waxman Industries, Inc.*, 132 Wn.App. 142, 145-46, 130 P.3d 874 (2006). Absent a showing by the defendant that sufficient facts exist to establish a *prima facie* defense, any subsequent trial would be pointless. *Griggs v. Averbek Realty*, 92 Wn.2d 576, 583, 599 P.2d 1289 (1979).

To establish a prima facie defense, the affidavits submitted to support vacation of a default judgment must precisely set out the facts or errors constituting a defense. *Johnson v. Cash Store*, 116 Wn.App. 833, 841, 847, 68 P.3d 1099 (2003); *Shepard Ambulance, Inc. v Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn.App. 231, 239-40, 974 P.2d 1275 (1999), *rev. denied* 140 Wn.2d 1007, 999 P.2d 1259 (2000). Merely stating allegations and conclusions is insufficient to establish a prima facie defense. *Commercial Courier Serv., Inc. v. Miller*, 13 Wn.App. 98, 533 P.2d 852 (1975) (citing CR 60(e)(1)). The moving party must instead offer admissible evidence and something more than broad, self-serving, unsupported statements. *Prest v. American Bankers Life Assur. Co.*, 79 Wn.App. 93, 99, 900 P.2d 595 (1995)(ruling that trial court erred considering inadmissible insurance application as evidence supporting *prima facie* defense). Here, the only purported “facts” C&K can point to

are Greer's self-serving contentions that he performed under the parties' agreement.

Gale complained in Superior Court of C&K's (i) breach of contract, (ii) negligence, and (iii) violation of the Consumer Protection Act. Gale provided detailed concrete facts and expert testimony establishing that C&K performed defective, unworkmanlike, and dangerous work on her home, causing significant damage to her property. *Gale Default Decl., Gale Vacate Decl., Damstrom Decl.* C&K asserts that it performed all work to "industry standards." Opening Brief at 27. But the only "evidence" of its workmanship C&K introduced is the Declaration of Christopher Greer contending that C&K went beyond the call of duty, properly performed work, and that Gale is simply looking not to pay C&K. *Greer Decl.*

C&K's asserts its defense to the contract claim is that the defective work (which C&K caused) was caused by a prior contractor, Evergreen, who performed work in her home five years previously. Opening Brief at 26. However, Gale was satisfied with Evergreen's performance. CP 215 ¶ 5.

Gale's evidence that C&K committed a *per se* violation of the Consumer Protection Act was unrefuted and even admitted by C&K in the deposition of Mr. Greer. Gale's testimony that she would not have hired

C&K had she known its license was suspended is unrefuted and irrefutable. But for C&K's breach of the Consumer Protection Act, Gale would not have hired it or suffered any attendant damages.

The Superior Court properly determined on the basis of the record before it that C&K failed to assert a viable *prima facie* defense.

2. C&K's Failure to Answer is Not Excusable.

A court must scrutinize the reasons asserted for a Defendant's failure to timely answer even where a defaulted defendant can show a *prima facie* defense. *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn.App. 231, 974 P.2d 1275 (1999). C&K cannot show that its failure to answer timely was the result of excusable neglect, mistake, surprise, or irregularity in the proceeding or judgment. CR 60(b)(1).

Here, Mr. Greer could not have been mistaken about the requirement for an attorney to sign C&K's pleading because he was informed of the requirement by Gale's counsel prior to the hearing on the Motion to Strike and Motion for Default. Mr. Greer represented that he had retained counsel prior to the hearing date. Mr. Greer's attorney was aware of the deficient pleading on the hearing date but did not attempt to contact the court to request relief or to file an answer bearing a proper signature as required under CR 11.

Equally, there was no irregularity in proceedings here where Gale filed a motion to strike and a motion to shorten time – both the letter and the spirit of the law were followed precisely. C&K’s mistakenly contends that an irregularity occurred when the trial court: (1) granted Gale’s one-day Motion to Shorten Time; (2) Struck C&K’s Answer; and (3) failed to give C&K reasonable time to correct the Answer’s deficiency after the omission was called to the attention of the pleader. Opening Brief at ___. KCLR 7(b)(10).

The “incompetence or neglect of a party's own attorney is not sufficient grounds for relief from a judgment in a civil action.” *In re Estate of Harford*, 936 P.2d 48, 86 Wn.App. 259 (1997)(quoting *Lane v. Brown & Haley*, 81 Wn.App. 102, 107, 912 P.2d 1040, review denied, 129 Wn.2d 1028, 922 P.2d 98 (1996))

3. The CR 60(b)(1) “Secondary” Factors Weigh Against Vacating the Default Judgment.

C&K’s claim that it acted with due diligence after notice of the default judgment is belied by the facts that it (i) never filed an Answer bearing a proper signature, (ii) did not challenge the basis for striking the Answer under Rule 11 or the authorities it now cites. On the other hand, should Gale be forced to reassert her claims in the lower court, she would be forced to endure a further delay before her eventual recovery, after

having waited 9 months for C&K to answer, enduring additional litigation over the propriety of the default judgment below, and awaiting resolution of this appeal. If the default judgment is vacated, Gale will suffer substantial hardship.

H. The Trial Court's Calculation of Damages and Award of Attorneys' Fees are Verities on Appeal.

"A ground for vacating a judgment under CR 60(b) will not be considered for the first time on appeal." *Leen v. Demopolis*, 62 Wn.App. 473, 483 815 P.2d 269 (1991), *rev. denied*, 118 Wn.2d 1022 (1992). An appellant asserting error in a court of appeals has to challenge a finding at trial court in order to provide the trial court an opportunity to correct any improper finding. RAP 2.5(a); *see Karlbera v. Often*, 167 Wn.App. 522, 531-32, 280 P.3d 1123 (2012) ("A failure to preserve a claim of error by presenting it first to the trial court generally means the issue is waived. While an appellate court retains the discretion to consider an issue raised for the first time on appeal, such discretion is rarely exercised." (citing *Bellevue Sch. Dist. No. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967)); *see also Smith v. Shannon*, 100 Wn.2d 26, 38, 666 P.2d 351 (1983) ("Failure to make such a motion when it would enable the trial court to correct its error precludes raising the error on appeal, unless the error was pointed out at some other point during the proceedings."); *see*

also Sofamor Danek Group, Inc. v. Brown, 124 F.3d 1179, 1186 (9th Cir. 1997) ("Before an argument will be considered on appeal, 'the argument must be raised sufficiently for the trial court to rule on it.'" (quoting *Broad v. Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir. 1996))) Failure to do so renders findings as verities on appeal. Moreover, even if C&K had challenged damages or attorneys' fees below, Appellate review of damages is extremely limited in scope in any event. *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 849-50, 792 P.2d 142 (1990); *Fosbre v. State*, 70 Wn.2d 578, 585-87, 424 P.2d 901 (1967).

Here, C&K challenged only entry of the default judgment (as amended) in the lower court. It did not attack the damages calculation in the lower court whatsoever. C&K moved below to set aside the default judgment on the basis of liability, but if it had wished to challenge the damages calculation employed by the lower court, it would have needed to assert a *prima facie* defense to the damages below. See *Little v. King*, 160 Wn.2d at 704 (holding that defendants contesting the amount of damages were required to present a *prima facie* defense to the asserted damages). C&K made no attempt below to argue that the CPA damages should be segregated. C&K now nit-picks damages (see e.g., Opening Brief at 28) but its objections were never raised below.

In any event, segregating CPA damages is not practical in this matter because C&K's violation of the CPA was a *per se* violation and implicated all of Gale's attendant claims. Lastly, contingency cases inherently depart from the lodestar method to account for the risks counsel undertakes in undertaking litigation without assurance of compensation. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983).

Because C&K failed to challenge any basis for the damages and attorney's fees awards below, the lower court's rulings on damages and attorney's fees should not be disrupted on appeal.

I. Gale is Entitled to Attorneys' Fees and Costs on Appeal.

As with the proceeding below, Gale is entitled to an award of her attorneys' fees in this appeal pursuant to the attorneys' fees provision in RCW 19.86.090.

IV. CONCLUSION

For the reasons stated above, this Court should affirm the Trial Court's entry of Amended Default Judgment against C&K Remodel, Inc. as well as the Trial Court's denial of C&K Remodel, Inc.'s Motion to Vacate Default Judgment.

Dated this 4th Day of March, 2015

Respectfully submitted,
Paramount Law Group, PLLC

A handwritten signature in black ink, appearing to read "Brent L. Nourse", written over a horizontal line.

Brent L. Nourse, WSBA No. 32790

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am the attorney of record for Respondent Kimberly Gale, and a member at Paramount Law Group, PLLC.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above entitled action, and am competent to be a witness herein.

On March 4, 2015, I served the foregoing Respondent's Opening Brief on the following parties *VIA ELECTRONIC TRANSMISSION AND HAND DELIVERY AND US MAIL*:

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I declare under penalty and perjury under the laws of the State of Washington that the foregoing is true and correct.

A handwritten signature in black ink, appearing to be 'Brent L. Nourse', written in a cursive style. The signature is positioned above a horizontal line.

Brent L. Nourse, WSBA No. 32790